IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-532

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary,

Petitioners,

v.

FLORIDA NURSING HOME ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners provide the Court with a reproduction of Florida Attorney General's Opinion 080-77 as Appendix I to this Brief. This recently released Opinion supplements the authorities on pages 17-20 of the Petition regarding the requirement for a statute to explicitly waive Florida's immunity from suit in federal court for retroactive damages. Petitioners were unaware of this Opinion at the time the Petition was filed and became aware of it through reading Florida Law Weekly, No. 40, dated October 17, 1980, page 39, summarizing recently released Attorney General's Opinions.

Florida Attorney General's Opinion 080-77 advised the Governor that he could not, by agreement with the U.S. Secretary of the Interior, waive the sovereign immunity of the State of Florida against suit by private parties in federal court for disclosure of

privileged information about oil and gas reserves adjacent to the state's seaward boundaries made available to the state under the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331).

By analysis of historic constitutional provisions and long-standing Florida case law, including the cases cited on page 18 of the Petition, the Florida Attorney General emphasized that the power to waive Florida's immunity from suit in federal court is vested exclusively in the Legislature and that absent legislation specifically authorizing waiver of that immunity, neither the Governor nor any state agency can waive it by contract or otherwise. The Opinion states in pertinent part:

"In Suits v. Hillsborough County, 2 So.2d 353 (Fla. 1941), the Florida Supreme Court stated that '[t]he only way that the State can give its consent to be made a party defendant to a suit is by legislative act...' Florida courts have frequently interpreted the language of SS 13 of Art. X, State Const., as continuing absolute sovereign immunity for the state absent waiver by legislative enactment or constitutional amendment. (citations omitted.) Further, such waiver of sovereign immunity must be effectuated by a general law of the Legislature, such waiver cannot be accomplished by special or local law. (citations omitted.) Therefore, the power to waive the state's sovereign immunity is vested exclusively in the Legislature. If only the Legislature has the constitutional authority to waive the state's sovereign immunity, it necessarily follows that neither the Governor nor any other state agency or officer can waive the state's sovereign immunity, by contract or otherwise, absent specific legislative authorization therefor in the form of a general law.

* * *

> The Florida Constitution requires specific, clear and unambiguous language in a statute in order to waive the sovereign immunity of the state. See, Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978). Furthermore, the power of the state to contract is a legislative prerogative and any residual power or authority not expressly provided or limited by the State Constitution is vested in the legislative branch. (citations omitted.) The Governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant, and therefore the Governor and other executive officers of the state have no general or inherent authority to contract in the state's behalf or to waive the sovereign immunity of the state and they can bind the state by contract only within the power specifically conferred on them by law. (citations omitted.)"

Of course, there is no statute in Florida specifically authorizing Petitioners to waive the state's immunity from suit in federal court by provider agreement or otherwise.

Thus, the opinion below, which fails to defer to state law on the question of consent[1], allows federal courts to usurp the prerogative of state legislatures throughout the country to decide whether to waive their State's Eleventh Amendment immunity.

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[1] Alabama v. Pugh, 483 U.S. 783, 57 L.Ed.2d 1115, 98 S.Ct. 3057 (1978), looked to Alabama law to determine that consent to sue that state in federal court could not be given. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), held that a state attorney general could not waive the state's eleventh amendment immunity unless he had been properly authorized by state law to do so:

> "[We do not] think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that state officer power to consent to suit against the state in courts when the state has not consented to suit." Id.,at 468.

Respondent nursing homes create the impression that they will not be paid for their services unless retroactive damages are awarded. This is untrue. Petitioners pay nursing homes in the program on a prospective basis. Rates for every facility are set in advance. Each home knows what it will be paid before it renders any services. The provider is free to accept that rate as payment or to withdraw from the program. As stated in Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare, 602 F.2d 150, 153-54 (8th Cir. 1979):

> "Participation by a nursing home as a provider of health care services to Medicaid recipients is voluntary. If appellants find that the reimbursement rates are insufficient, then they may either make their homes more efficient and economical or terminate their relationship with Medicaid and no longer accept Medicaid recipients as residents."

Respondent nursing homes were paid during the period prior to October 1977 under the previous reimbursement plan, which was not "cost-related" because the ceiling rates (caps) were legislatively set and thus not related to the median or some other percentile of per diem costs. However, all rates were set in advance, and providers were not locked into the program by virtue of the provider agreement and were obligated to accept amounts paid under the plan as payment in full. See Briarcliff Haven, Inc. v. Department of Human Resources, Ga., 403 F.Supp 1355, 1362-63 (N.D. GA 1965):

"Providers of services are not required to participate in a state's Medicaid program, but if they do choose to participate, they must agree to accept payment in accordance with the state plan provisions. According to 45 C.F.R. §§ 25.30(a)(6), the state plan must provide for limiting participation in the program to providers of services who accept, as payment in full, the amounts paid in accordance with the state's established fee structure. If a qualified provider believes that it is able to collect higher fees by not participating in the Medicaid program, it need not choose to participate. The Medicaid program is not designed to protect providers from the consequences of their business decisions or from business risks."

Respondent nursing homes say it would be inequitable if federal court jurisdiction did not exist to award retroactive damages. The proper remedy for the nursing home providers was to bring a suit for mandatory injunctive relief as soon as they had cause to believe that Florida was not going to implement a new plan on July 1, 1976. The nursing home industry is in close touch with departmental personnel, and it was not difficult to discern that the State was not in any position to implement a new plan, especially since HEW regulations were not even promulgated until June 30, 1976. See 41 Fed.Reg. 27300-27308.

In any event, an appellate court's impression of equity[2] is not probative of whether jurisdiction exists. Federal court jurisdiction rests on whether necessary prerequisites have been met: in this case, whether the State had explicitly consented under requirements of State law to federal court jurisdiction to award retroactive damages.

The perception of the opinion below by respondent nursing homes provides ample basis for this Court's review. If federal court

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2 Since the district court found no jurisdiction to award retroactive damage, the question of whether it would be equitable to award such damages was not decided nor presented as an issue in the case on appeal. Hence, the analysis required to be performed if in fact there were jurisdiction was not before the Court. See Owens v. Roberts, 377 F.Supp. 45, 58-59 (M.D. Fla. 1974)(3-judge panel).

Incidentally, the West Reporter citation to Owens v. Roberts was not given when that case was cited in footnote 18 on page 30 of the Petition. The citation in that footnote should have been to 377 F.Supp. at 59-60.

jurisdiction to award retroactive damages against states in private party suits is now based on notions of equity, federal courts can capriciously intervene in the fiscal affairs of the States in total disregard of their Eleventh Amendment rights.

Respectfully submitted,

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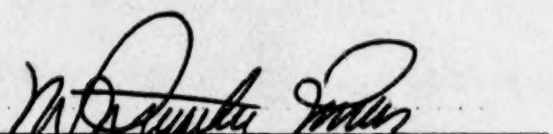
BY: 
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 1980, three copies of Petitioners' Reply and Supplemental Brief were mailed, postage prepaid, to ELLIOTT SHAW, ESQUIRE, Suite 611, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132; A. THOMAS MIHOK, ESQUIRE, 5458 Woodcrest Drive, North, Orlando, FL 32807; THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530; and JIM R. BRUCE, II, Special Assistant Attorney General of Mississippi, Post Office Box 220, Jackson, Miss., 39205; TYRONE C. FAHNER, Attorney General of Illinois, 160 North LaSalle Street, Suite 900, Chicago, Illinois 60601; SCOTT A. SMITH, Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Mass. 02108; and WILLIAM P. MARSHALL, Assistant Attorney General of Minnesota, 515 Transportation Building, St. Paul, Minn. 55155; Attorneys for the Amici.

Attorney

APPENDIX I

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

September 11, 1980

JIM SMITH
Attorney General
State of Florida

080-77

The Honorable Bob Graham
Governor, State of Florida
Office of the Governor
The Capitol
Tallahassee, Florida 32301

Re: GOVERNOR--SOVEREIGN IMMUNITY--state may waive immunity only by a general act of the Legislature. Art. X, §13, State Const.; 43 U.S.C. §1331, et seq. (1979).

Dear Governor Graham:

This is in response to your request for an opinion on substantially the following question:

MAY THE GOVERNOR WAIVE THE SOVEREIGN IMMUNITY OF THE STATE BY CONTRACT WITH THE UNITED STATES GOVERNMENT?

The outer Continental Shelf (OCS) Lands Act, as amended on September 18, 1978, 43 U.S.C. §1331, et seq. (1979), makes available to coastal states certain privileged and proprietary information concerning oil and gas reserves located adjacent to the states' seaward boundaries. Section 1345(e) of the Act authorizes the Secretary of the Interior to enter into cooperative agreements with affected states pertaining to such matters, among other things, as the sharing of this privileged and proprietary information. Section 1325(c) requires the Secretary to prescribe regulations which assure the maintenance of the confidentiality of the privileged or proprietary information. Subsection (e) of §1352 requires that prior to the transmittal of any privileged information or granting the state access thereto, the Secretary of the Interior

and the Governor of the affected state enter into a written agreement in which the state agrees as a condition precedent to receiving or being granted access to such information that the state waive certain defenses specified in subsection (f) of §1352, and to hold the United States harmless from any violations of the regulations prescribed by the Secretary of the state or its employees may commit. The defenses the state must waive as a condition precedent as specified in subsection (f) are any claim of sovereign immunity and "any claim that the employee who revealed the privileged information which is the basis of such suit was acting outside the scope of his employment in revealing such information." Subsection (f)(1), further provides that whenever an employee of the state or federal government reveals confidential or

proprietary information in violation of the regulations prescribed by the Secretary that the lessee or permittee may commence a civil action for damages in the appropriate federal court against the United States or the state. The copy of the agreement you submitted along with your request incorporates these statutory requirements. You question whether the Governor has the authority, absent specific legislative authorization, to waive the sovereign immunity of the state.

The doctrine of sovereign immunity is a general principle of jurisprudence handed down to us from the common law of England. The principle that the sovereign cannot be sued without its consent applies with equal force to the several states of the Union. See, 72 Am.Jur.2d States §99 (1974); State ex rel. Davis v. Love, 126 So. 374 (Fla.

1930). In 81A C.J.S. States §298 (1977) at page 942, it is stated that "[i]t is a well established rule of law that a state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent in its own courts, nor can it, under the principle of sovereign immunity, be sued without its consent in the courts of a sister state or elsewhere."

Therefore, unless the State of Florida has waived or consents to waive its sovereign immunity, the state cannot be sued by a private party either in state or federal courts. See, Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971); Seaboard Airline Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5th Cir. 1958); Washington v. Brantley, 352 F.Supp. 559 (M.D. Fla. 1972). In Seaboard Airline Railroad Co. v. Sarasota-Fruitville

Drainage District, the Fifth Circuit Court of Appeals concluded that an indemnity agreement between the drainage district and the railroad company was void and could not be enforced because the state had not authorized the district to enter into such an agreement. Cf., §161.101(3), F.S., which authorizes the Department of Natural Resources to enter into indemnification agreements with "federal, state, and other local governments and political entities, or any agencies or representatives thereof, for the purpose of improving, furthering, and expediting the beach and shore preservation program."

While a state's sovereign immunity is subject to limitations which arise from the federal nature of the United States and a state may be sued in a federal court by the United States Government or a federal agency or

instrumentality,[1] no question involving this complex federal-state interrelationship is raised. The contractual agreement between the Department of Interior and the State of Florida provides, and §1352 of the OCS Lands Act requires that the lessee or permittee who supplied the privileged information may commence a civil suit for damages against the federal government or the state if such information is revealed and that the state waive its defense of sovereign immunity and the defense that the employee who revealed the information was acting outside the scope of his employment in revealing such information in a suit commenced against the federal government or

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[1] See, Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966); Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934).

the affected state. 43 U.S.C. §1352(e) and (f) (1979). See, Palmer v. Ohio, 248 U.S. 311, 40 S.Ct. 16, 63 L.Ed. 108 (1918), in which the Supreme Court stated that the right of a private individual to sue a state in either a federal or state court cannot be derived from the Federal Constitution or laws of the United States, but can only come from the consent of the state; and see, Seaboard Airline Railroad Co. v. Sarasota-Fruitville Drainage District, supra. Article X, §13, of the State Constitution, Formerly Art. III, §22, State Const. 1885, provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The well-established principle of expressio unius est exclusio alterius is applicable to this constitutional provision. This principle requires that when

the constitution expressly provides the manner in which a thing is to be done, then it impliedly prohibits the thing from being done in a different manner. While the constitution does not in express terms prohibit the doing of a thing in a different manner, the fact that the constitution has prescribed the manner in which the subject matter shall be done is itself a prohibition against a different manner of doing it. See, In re Advisory Opinion of Governor Civil Rights, 306 So.2d 520 (Fla. 1975); State ex rel. Davis v. Love, 126 So. 374 (Fla. 1930); Weinberger v. Board of Public Instruction of St. Johns County, 112 So. 253 (Fla. 1927). A number of judicial decisions have expressly ruled on this constitutional provision, or its identical predecessor in the 1885 Constitution. See, Circuit Court of Twelfth Judicial Circuit v.

Department of Natural Resources, 339 So.2d 1113 (Fla. 1976); Davis v. Watson, 318 So. 2d 169 (Fla. 1975); Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968); State ex rel. Davis v. Love, 126 So. 374 (Fla. 1930); Hampton v. State Board of Education, 105 So. 323 (Fla. 1925).

In Suits v. Hillsborough County, 2 So.2d 353 (Fla. 1941), the Florida Supreme Court stated that "[t]he only way that the State can give its consent to be made a party defendant to a suit is by legislative act . . . ." Florida courts have frequently interpreted the language of §13 of Art. X, State Const., as continuing absolute sovereign immunity for the state absent waiver by legislative enactment or constitutional amendment. See, Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, supra; Spangler v. Florida State

Turnpike Authority, 106 So.2d 421 (Fla. 1958); Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959). Further, such waiver of sovereign immunity must be effectuated by a general law of the Legislature, such waiver cannot be accomplished by special or local law. See, Arnold v. Shumpert, supra; State ex rel. Davis v. Love, supra; Davis v. Watson, supra. Therefore, the power to waive the state's sovereign immunity is vested exclusively in the Legislature. If only the Legislature has the constitutional authority to waive the state's sovereign immunity, it necessarily follows that neither the Governor nor any other state agency or officer can waive the State's sovereign immunity, by contract or otherwise, absent specific legislative authorization therefor in the form of a general law.

The courts are without jurisdiction over suits commenced against the state for breach of contract, unless the state has given its consent. See, e.g., Cone v. Wakulla County, 197 So. 536 (Fla. 1940); Hampton v. State Board of Education, 105 So. 323 (Fla. 1925). In Hampton v. State Board of Education at page 328, the Florida Supreme Court stated that "where the suit involves a contract or property right of the state . . ., [such suit] cannot be maintained in so far as it affects property rights of the state, or seeks to enforce a contract made by or for the state, unless the consent of the state be duly given." In Venezia A, Inc. v. Askew, 363 So.2d 367 (1 D.C.A. Fla., 1978), the court dismissed an action brought against the Governor for damages for breach of contract holding that the doctrine of sovereign immunity barred recovery. In AGO

78-20, my predecessor in office determined that in the absence of a general law which authorizes a state agency to enter into an indemnification agreement which imposes liability on the state, such contracts are nugatory and unenforceable against the state or its agencies. See also, Seaboard Airline Railroad Co. v. Sarasota Fruitville Drainage District, supra. AGO 087-188.

You have not brought to my attention nor has my research revealed any general law which purports to vest the Governor with the authority to waive the sovereign immunity of the state pursuant to an agreement entered into under the OCS Lands Act. In the absence of such legislation, I am compelled to conclude that the Governor does not have such authority.

The Florida Constitution requires specific,

clear and unambiguous language in a statute in order to waive the sovereign immunity of the state. See, Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978). Furthermore, the power of the state to contract is a legislative prerogative and any residual power or authority not expressly provided or limited by the State Constitution is vested in the legislative branch. See, 16 Am. Jur.2d Constitutional Law §§318 et seq. (1970); 10 Fla. Jur.2d Constitutional Law §§141 et seq. (1979); Ago's 071-28, 068-44. The Governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant, and therefore the Governor and other executive officers of the state have no general or inherent authority to contract in the state's behalf or to waive the sovereign

immunity of the state and they can bind the state by contract only within the power specifically conferred on them by law. See, C.J.S. States §§130, 156 (1977); Edgerton v. International Company, Inc., 89 So.2d 488 (Fla. 1956); Florida Industrial Commission ex rel. Special Disability Fund v. National Trucking Company, 107 So.2d 397 (1 D.C.A. Fla., 1959); AGO 071-28.

In conclusion, I am therefore of the opinion that the Governor is not authorized by the Constitution or by general law to waive the sovereign immunity of the state pursuant to a contractual agreement with the United States Department of Interior in order to obtain certain privileged and proprietary information concerning oil and gas reserves adjacent to the state's seaward boundary under the Outer Continental Shelf Lands Act, as amended, 43 U.S.C.

§1331, et seq. (1979).

Sincerely,

/s/ Jim Smith

JIM SMITH
Attorney General

Prepared By:

/s/ Craig B. Willis

CRAIG B. WILLIS
Assistant Attorney General

JS/CBS/is